No. 10-335

IN THE

Supreme Court of the United States

PEARL COTTIER,
REBECCA THREE STARS,

Petitioners,

—v.—

CITY OF MARTIN; et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

This case reads like a tale of two cities. The district court described a city whose Indian community is well organized, politically cohesive, and deeply engaged in federal, state, county, school board, and municipal elections. (App. 44a-50a.) The respondents, on the other hand, claim that Martin's Indian voters expressed no discernible preferences in seven straight aldermanic elections. (Br. 24.) The respondents describe a very different Martin because they want this Court to believe that the district court simply chose their version of the facts over ours, making this a fact-bound case unworthy of further review.

The reality, however, is that the district court rejected the respondents' version of the facts. It rejected their claim that Indian voters had no discernable preferences in city elections (App. 49a-50a), and it later rejected the testimony upon which the respondents rely (App. 130a). The outcome of this case turns not on a choice of facts but on the answers to three important questions of law that will affect whether and how Section 2 of the Voting Rights Act applies in small cities like Martin.

These questions need answers now. There is no doubt that the absence of statistical evidence from aldermanic elections makes this case more complicated than some, but that's also what makes it so important. There are likely hundreds of small jurisdictions like Martin in Indian Country and across the nation where statistical analysis of racially polarized voting is impossible

because of the small number of precincts. Many of them are soon to redistrict. They need to know whether the impossibility of statistical analysis frees them to draw plans like Ordinance 122, which fragments Martin's Indian population with almost surgical precision, and effectively shields them from liability for vote dilution under Section 2.

I. THIS CASE IS NOT MOOT

The petitioners contend that this appeal is moot because the city will hold no more elections under Ordinance 122 after June of next year. They claim that the city will redistrict following the release of the decennial census next year and that vote dilution under Ordinance 122 is therefore incapable of repetition.

In fact, there is no reason to think that the city will redistrict following the release of the 2010 Census, and the record suggests that it won't. State law does not require the city to redistrict, and this Court's one-person-one-vote cases would only require the city to redistrict in the unlikely event that substantial and uneven population changes cause Ordinance 122 to become malapportioned. Those changes are unlikely because Martin's population has been remarkably stable. Between 1990 and 2000, the city's population decreased by only 24 people. (Trial Ex. 180 at 11.) Martin has not changed its boundaries since the last census, and there is no evidence of a significant increase or decrease in population—much less a change that is concentrated in any particular ward. Before

Ordinance 122, the city had not redistricted in decades (Trial Tr. vol. 10, 2169:7-19, July 1, 2004), and it could well be decades before Martin redistricts again.

As a legal matter, moreover, the respondents' argument is beside the point. The petitioners' complaint here is not simply about vote dilution under Ordinance 122. It is about vote dilution by the fragmentation of Martin's Indian population among the city's three wards. That is the "alleged illegality" that is capable of repetition, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and that's why the remedy in this case would be not only to enjoin the city from enforcing Ordinance 122 but also to require the city to hold future elections under a nondilutive plan. Unless and until the city holds elections under a nondilutive plan, the petitioners will continue to suffer the injury described in their complaint.

This continuing injury is not merely speculative. If the city were to redistrict after next year's elections, its new plan would likely be based on Ordinance 122. Indeed, the author of Ordinance 122 testified that his goal in drawing that plan was to make "minimal changes" to the preexisting plan in order to "keep it simple" and avoid voter confusion. (Trial Tr. vol. 7, 1370:1-3, June 28, 2004.) Minimal changes, however, would not be enough to fix the severe fragmentation apparent in Ordinance 122. It is therefore not only possible but likely that the petitioners would again face a plan that gives non-Indian voters an overwhelming

supermajority in all three wards if the city were to redistrict in the future as it has in the past. That likelihood, rather than the likelihood of further elections held under Ordinance 122, is what preserves the issue of vote dilution for review by this Court as "capable of repetition but evading review." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 895 (2010).

Finally, prudential considerations also favor hearing the case now despite the possibility of future redistricting. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89 (2000) (the Court's interest in preventing litigants from attempting to manipulate its jurisdiction in order to insulate a favorable decision from review weighs against a finding of mootness). Voting cases can take a long time. *See, e.g., Easley v. Cromartie*, 532 U.S. 234 (2000). The petitioners brought this case in early 2002, and they have prosecuted it diligently throughout its lifespan. Denying certiorari now because of the possibility that the city might redistrict next year would give jurisdictions every incentive to run out the clock on voting claims in the future, and it would virtually foreclose all but the speediest possible challenges to redistricting plans enacted after the middle of a decade.

Mootness should therefore be no impediment to a grant of certiorari. This case continues to present real, live, and important questions about the proper application of the Voting Rights Act, and this Court should answer them now.

II. RESPONDENTS HAVE NO ANSWER TO THE JURISDICTIONAL QUESTION

The respondents contend that there is no jurisdictional question. They argue, specifically, that the district court's original finding was a final decision reviewable in the court of appeals under 28 U.S.C. § 1291 even if that decision did not merge into the final judgment from which they appealed after remand. They argue, in other words, that the merger rule is irrelevant.

That cannot possibly be the case. Just last term, this Court made clear that final decisions are not reviewable forever. In *Salazar v. Buono*, 130 S. Ct. 1803, 1814 (2010), the Government challenged Buono's standing to bring an Establishment Clause claim after that claim had been fully adjudicated and Buono was seeking to enforce the court-ordered injunction. The Court held, however, that the district court's original decision on standing became final and unreviewable upon the expiration of the 90-day period for filing a petition for certiorari from the initial Establishment Clause ruling. The Government could not seek review of the district court's clearly final decision upon appeal from a subsequent order enforcing the original judgment. The respondents' argument that final decisions are perpetually reviewable is thus inconsistent with *Salazar's* holding that some final decisions really do become final.

Here, the district court's original findings were embodied in its 2005 judgment. As in *Salazar*, the parties' opportunity to seek review of that judgment ended when neither party filed a

petition for a writ of certiorari following the Eighth Circuit's denial of rehearing en banc. On remand, the respondents appealed the district court's 2007 judgment. (Not. Appeal, Mar. 6, 2007.) As in *Salazar*, the court of appeals had no jurisdiction in the subsequent appeal to decide issues that were embodied in the 2005 judgment but not in the 2007 judgment. So how, then, could the Eighth Circuit have had jurisdiction to review the district court's original finding, embodied in the 2005 judgment, on appeal from the 2007 judgment?

The respondents have no answer to this question. They seem to concede that the district court's original finding on the third *Gingles* factor, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), did not merge into the 2007 judgment, and they offer no explanation beyond their argument for perpetual reviewability. The Eighth Circuit's jurisdiction to review a finding embodied only in the 2005 judgment on appeal from the 2007 judgment thus seems doubtful at best. The jurisdictional issue remains a serious question that this Court should either resolve, ask the Eighth Circuit to resolve in the first instance, or hold pending clarification of the merger rule in *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009), *cert. granted*, 130 S.Ct. 2371 (Apr. 26, 2010) (No. 09-737).

III. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER NON-STATISTICAL EVIDENCE IS "SUFFICIENT" TO ESTABLISH RACIALLY POLARIZED VOTING.

On the merits, the respondents claim that the courts below did not reject the petitioners' nonstatistical evidence but just couldn't identify the Indian-preferred candidates because of a disputed record. This claim is simply impossible to reconcile with the district court's opinion or with the record itself.

A. Nowhere in its opinion does the district court express any difficulty in discerning the Indian-preferred candidates in Martin's municipal elections. To the contrary, the district court found that the plaintiffs could not establish the third *Gingles* precondition *despite* its ability to identify the Indian-preferred candidates in municipal elections and their consistent defeat.

The district court clearly considered the 2003 exit poll. (App. 55a-56a.) It found that the poll identified the two Indian-preferred candidates, Gotheridge and Justus, and it found "that the Indian-preferred candidates lost." (App. 56a.) But it rejected the poll as "not sufficient proof of polarization" under the third *Gingles* precondition because white voters were underrepresented in the sample. (App. 56a, 43a.) The court rejected the evidence not because of any inability to discern the Indian-preferred candidates or their consistent defeat but because of its ruling that the third *Gingles* precondition required the plaintiffs to make an additional

showing of white bloc voting—something that it mistakenly believed the poll could not do.

The district court then rejected lay witness testimony for essentially the same reason. It noted that the petitioners had presented testimony identifying the Indian-preferred candidates in aldermanic elections, and it noted that those candidates lost consistently. (App. 76a.) The court also noted the petitioners' contention that white bloc voting was the only possible explanation for the defeat of Indian-preferred candidates in a city with no other racial or ethnic groups. But the court disagreed, concluding that the lay testimony was "not sufficient to meet the plaintiffs' burden" because it did not eliminate explanations for the defeat of Indian-preferred candidates other than white bloc voting, such as "campaign efforts, platform popularity, or candidate characteristics." (App. 76a.) And because lay testimony was insufficient to meet the plaintiffs' burden, the district court made no findings whatsoever about the Indian-preferred candidates in the 2002 and 2004 municipal elections.

These rulings squarely raise the question of what showing is necessary to prove the third *Gingles* precondition. Can a plaintiff meet its burden with nonstatistical evidence identifying the minority-preferred candidates and showing that they were defeated? Or must a plaintiff show something more?

The panel decision in *Cottier I* correctly recognized that, as a mathematical proposition, white bloc voting is the only explanation for the

defeat of candidates preferred by the majority of Martin's Indian voters, and that, as a result, the district court was wrong to conclude that the plaintiffs had not met their burden. (App. 94a.) The en banc court reversed in *Cottier II*, agreeing with the district court's ruling that the third *Gingles* precondition requires a showing of white bloc voting that nonstatistical evidence about the defeat of minority-preferred candidates does not provide. (App. 172a.)

Every other court to have considered this issue, including this Court in *Gingles*, has come down on the side of *Cottier I*. This Court should therefore grant the writ of certiorari to resolve the conflict and clarify *Gingles*.

B. The record also fails to support the respondents' suggestion that there is a factual dispute over the identity of the Indian-preferred candidates in municipal elections.

Our petition lists all of the candidates in the seven aldermanic elections between 2002 and 2004 and identifies the Indian-preferred candidates in each. (Pet. 6.) That list is supported by the testimony of five lay witnesses, all of whom are tribal members and have lived in the Martin area for virtually all of their lives,[1]

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[1] The respondents contend that the plaintiffs' lay witnesses were not as reliable as theirs because only one of them "actually lived in the City of Martin" and the others were "Indian activists living on reservation land" outside of the city. (Br. 20.) This is a red herring at best. One of the lay witnesses was Martin-resident and plaintiff Pearl Cottier, who first moved to the city when she was thirteen years old and who had lived and voted there for most of her then

and it is corroborated by campaign materials prepared and distributed by Indian activists within the city.

The respondents have produced no alternative list. They do not claim, for example, that Rodney Anderson was the Indian-preferred candidate in the 2002 election for Ward I against Rebecca Three Stars. There is not a scintilla of evidence in the trial record indicating that Anderson was the Indian-preferred candidate, and any finding that he was would be clearly erroneous because it lacked support in the record. There is likewise not a scintilla of evidence that Three Stars was *not* the Indian-preferred candidate and any finding that she was not would also lack support in the record. Despite ample opportunity at trial, in numerous post-trial and appellate briefs, and in their brief before this Court, the respondents have never identified

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seventy-three years. The other lay witnesses were: Alice Two Bulls Young, a Lakota elder who had lived in or around Martin since 1958 and lived at the time in tribal housing on Indian trust land located less than two miles outside of the city limits; Gerald Bettelyoun, who worked in the City of Martin for twenty-seven years and had spent his entire life living near Martin; Charlie Cummings, who was born and raised in Martin, who had spent all but a year of his life in the area, and who also lived at the time less than two miles east of the city limits; and Craig Dillon, who had lived in the Martin area since grade school and lived at the time in tribal housing one mile north of Martin. The district court expressly found Dillon's testimony to be "reliable," "credible," and worthy of "great weight" in its analysis of Indian political cohesiveness in Martin (App. 49a), and it found the witnesses upon which the respondents rely to be "incredible" (App. 130a).

anyone as an Indian-preferred candidate in the 2002, 2003, or 2004 municipal elections. That does not make for a genuine factual dispute over the identity of Indian-preferred candidates.

There is no doubt that Native Americans in Martin are not monolithic in their political views. The respondents have made that argument repeatedly. But the district court correctly rejected their argument that the absence of a monolith means that Indian voters in Martin lack identifiable issues, interests, and candidates of choice. (App. 49-50a.)

Even if there were a genuine dispute over the identity of the Indian-preferred candidates, moreover, the district court should have resolved it. The identity of those candidates, plus the fact of their defeat at the hands of non-Indian voters, should have been sufficient for the plaintiffs to meet their burden under the third *Gingles* precondition.

IV. THE EIGHTH CIRCUIT'S ANALYSIS OF NONMUNICIPAL ELECTIONS SQUARELY PRESENTS TWO IMPORTANT CONFLICTS OF LAW.

The respondents offer only a tepid defense of the en banc court's analysis of nonmunicipal elections.

First, they contend that *Johnson v. De Grandy*, 512 U.S. 997 (1994), is "irrelevant" because, although Indian's make up a substantial majority of Bennett County's total population, the voting-age population of the county is evenly split. (Br. 28-29.) But they don't claim that white voters are a majority in the county, nor do they otherwise explain why it was appropriate for the courts below to infer equal opportunity in Martin, where Native Americans constitute only 36% of the voting population, from success for Indian-preferred candidates at the county level, where Native Americans constitute 50% of the voting-age population.

Second, the respondents claim that both the district court and the en banc court below gave interracial elections more probative value than elections with only white candidates, but that claim doesn't square with their own tallies showing no success for Indian-preferred candidates in interracial elections. (Br. 30.)

More importantly, the respondents don't dispute the troubling fact that Indian voters have had no success in electing their preferred candidates except in nonmunicipal elections,

when those candidates are white,[2] or when the courts gauged success or failure based on county election results.[3] And they don't even attempt to reconcile this lack of success with the Voting Rights Act's guarantee of equal electoral opportunity.

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[2] The respondents ask where in the record we find evidence of the race of Indian-preferred candidates. (Br. 32.) Among other places, the race of candidates is listed in the report of the respondents' own expert statistician. (Trial Exs. 449, 450.)

[3] The respondents confuse county *results* with county *data*. Both parties' experts used county *data* to determine the identity of the candidates preferred by Indian voters in the city's three precincts. The error of the courts below was in using county *results* to tally the success or failure of those candidate. Those courts tallied a success even if the candidate preferred by Martin's Indian voters lost in the city.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the Court should grant certiorari to review the judgment of the Eighth Circuit.

In the alternative, the Court should grant, vacate, and remand the case to the Eighth Circuit to allow it to consider the jurisdictional question in the first instance, or it should hold the petition pending the Court's resolution of *Ortiz v. Jordan*, 09-737.

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